

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOSHUA GLENN TAYLOR)	
Claimant)	
)	
VS.)	
)	
PRICE TRUCK LINE, INC.)	
Respondent)	Docket No. 1,053,185
)	
AND)	
)	
NATIONAL INTERSTATE INS. CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier request review of the October 27, 2011 Award by Administrative Law Judge Rebecca Sanders. The Board heard oral argument on January 25, 2012. The Workers Compensation's Director appointed Jeffrey King of Salina, Kansas, to serve as Board Member Pro Tem in place of Gary R. Terrill, who recused himself from this proceeding.

APPEARANCES

Scott J. Mann of Hutchinson, Kansas, appeared for the claimant. Ryan Weltz of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. Although respondent's brief to the Board listed whether claimant suffered accidental injury arising out of and in the course of employment as an issue, at oral argument before the Board, the respondent agreed it was undisputed claimant suffered two separate work-related accidental injuries both of which are included in this single docketed claim and the dispositive issue was whether claimant suffered a permanent injury from those accidents.

ISSUES

The claimant suffered accidental injury to his low back in a work-related accident on January 6, 2010, when the semi-truck he was driving jackknifed off the roadway into a ditch during a snowstorm. Claimant received medical treatment and continued working for respondent. Claimant suffered another injury to his low back lifting 55-gallon barrels on

March 26, 2010. Respondent argued claimant merely suffered temporary aggravations of his preexisting degenerative disk disease but no increased permanent disability from either accidental injury.¹ Claimant argued he suffered additional permanent functional impairment and, in any event, because of new restrictions imposed by the doctors he suffered a work disability.

The Administrative Law Judge (ALJ) found claimant sustained a 10 percent functional impairment and an 82 percent work disability based upon a 100 percent wage loss and a 64 percent task loss beginning September 9, 2010.

Respondent requests review of the nature and extent of claimant's disability as well as whether claimant is entitled to future medical treatment. Claimant argues the ALJ's Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant started working as a truck driver for respondent in April 2008. He drove a single axle semi-truck in order to deliver goods. Claimant's job consisted of driving to the destination, unloading the goods either by hand or forklift and carrying it to the customer. This required him to lift from 0-250 pounds, bend, twist, walk and stand.

In 2006, before his employment with respondent, claimant had developed low back problems and an MRI study revealed degenerative disk disease. Claimant was treated with a series of three epidural injections. No temporary or permanent work restrictions were deemed necessary. Claimant testified that after treatment he would be pain free for a couple of weeks to a month or so and then experience a little pain. But he was able to perform his job duties.

On January 6, 2010, claimant had just delivered a load in Manhattan, Kansas, and he was driving to Abilene, Kansas. He reached Junction City, Kansas, during a snow storm with high winds when his semi-truck with two trailers jackknifed on the interstate. The semi left the roadway and landed in a ditch. Claimant injured his lower back and also hit his head. An ambulance was called and it took claimant to Abilene Hospital's emergency room. X-rays were taken and then claimant was sent home with prescription medication to alleviate the pain. Respondent was immediately notified of the accident. Claimant was off work for two or three days and then returned to full duty. Claimant continued to have low back problems but he continued working because he needed a paycheck.

¹ Johnson Depo at 41.

After the January 6, 2010 accident, claimant gave a recorded statement and indicated that he did not feel he had any problems above and beyond what he had before the accident. It is significant to note that the recorded statement was made after the initial accident but before the second lifting accident.

Claimant suffered another accidental injury on March 26, 2010. He was delivering 12 55-gallon barrels of chemical treatment to K-State. Three or four barrels fell off the pallet in the trailer. Claimant was lifting these 55-gallon barrels to return them to the pallet so that he could unload the barrels from the truck. Claimant testified that he had returned two of the barrels to the pallet and was trying to return the third barrel to the pallet when he experienced pain in his lower back and down his left leg. He contacted his dispatcher immediately and advised him of the accident. Because of the leg pain claimant had trouble using his left leg to engage the clutch. Claimant sought medical treatment with his doctor and was placed on light-duty work for a couple of days. Respondent provided him with a co-worker to ride with him to load and unload the freight.

Claimant continued to work, but missed a lot of work due to migraines or back pain. By the end of August 2010, claimant had missed enough work that he had used all of his vacation leave. In September 2010 claimant sought treatment with his personal physician who took claimant off work. The last day claimant worked was September 9, 2010. Claimant testified that as he continued to try to work his back condition progressively worsened.

Dr. Michael Johnson, board certified in orthopedic surgery, examined and evaluated claimant on December 7, 2010, at respondent's attorney's request. Claimant was having complaints of low back pain, left leg pain and headaches. The doctor reviewed claimant's medical records and also took a history from him. Upon physical examination, Dr. Johnson found claimant had mild tenderness to the bilateral paraspinal muscles, mild decrease in pain in his left leg which does not follow any dermatomal or radicular patterns, and generalized weakness in the left leg secondary to reported pain. The doctor diagnosed claimant as having chronic preexisting lumbosacral multilevel degenerative disc disease at L4-5, L5-S1, bulging disc, and a temporary exacerbation secondary to motor vehicle accident on January 6, 2010, which has resolved.

Dr. Johnson began providing claimant's treatment on January 6, 2011. The doctor recommended that claimant have epidural steroid injections and continue his current medications. Claimant was to remain off work. Claimant returned for a follow-up visit on January 27, 2011, due to having the epidural steroid injections. The next time Dr. Johnson saw claimant again for follow-up regarding his epidurals was on March 3, 2011. It was recommended at that time that claimant continue physical therapy but also receive some aqua therapy as well as an evaluation of a return to work with restrictions. Dr. Johnson opined that claimant's motor vehicle accident was a temporary exacerbation of his preexisting degenerative condition.

On April 14, 2011, claimant returned to see Dr. Johnson regarding the results of his functional capacity evaluation. At this time, claimant had reached maximum medical improvement and he was released to return to work with restrictions. Claimant was to avoid the following: (1) over shoulder work occasionally 30 pounds, frequently 25 pounds; (2) carrying occasionally 35 pounds, frequently 20 pounds; (3) pulling 90 pounds; (4) pushing 105 pounds; (5) bending and stooping frequently; and, (6) squatting, crawling, climbing, crouching and kneeling occasionally. Based on the *AMA Guides*², Dr. Johnson placed claimant in the DRE Lumbosacral Category II for a 5 percent whole person impairment due to his lumbar spine condition.

Dr. Johnson testified:

Q. And did you attribute that five percent whole person impairment to the motor vehicle accident in question, or was it attributable to other causes or prior causes?

A. In my opinion at that time the motor vehicle accident had no bearing on that impairment rating. I did not address that in the letter, but this impairment rating would encompass preexisting lumbosacral degenerative changes. And based on the history, when I put permanent aggravation, it appears based on history that it was a permanent aggravation from a March 2010 injury, as my opinion is that this motor vehicle accident temporary exacerbation resolved at that time.³

Dr. Johnson further testified:

Q. And did that lifting injury in March of 2010 change your opinion at all as far as to what causes the impairment that you identified was attributable to?

A. Based on his history, it would appear that he had a more permanent aggravation from his lifting episode in March, as that represented a continuation of low back pain that needed treatment and had subjective complaints. It appeared, based on the history, that for essentially eight weeks after the motor vehicle accident he didn't seek any medical treatment for that eight week period. Therefore it was my opinion that this had resolved by then, and that the March of 2010 injury probably had more play into where he was at this time. So it was a permanent aggravation of a preexisting condition that occurred in March of 2010.

Q. Did you assign any permanent impairment to the lifting episode?

A. I did not apportion that out.

²American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *AMA Guides* unless otherwise noted.

³ Johnson Depo. at 15.

Q. I want to be clear, though. Doctor, when you issued your permanent impairment rating on May 27, 2011, you determined that he had a five percent functional impairment to his body secondary to his back complaints that had basically never resolved?

A. Never resolved from apparently March of 2010, based on his history.

Q. So is it your testimony, then, that the five percent impairment that you provided in the May 27, 2011 letter was attributable to the lifting incident in March of 2010?

A. It was my opinion that the lifting incident did not cause his condition or diagnosis that he's currently in treatment for, it simply aggravated it, his condition was preexisting.⁴

At his deposition, Dr. Johnson was provided the recorded statement claimant had given an insurance adjuster and then changed his opinion regarding causation for claimant's impairment. Dr. Johnson clarified his opinion:

Q. If you were writing this letter today, Doctor, would it look the same?

A. Most of it would be the same. I would, based on the information that I've just been given this morning in the deposition, I would probably change line six and leave out the permanent aggravation because I have concerns right now whether these injuries actually made his back worse or not, functionally or symptomatically. Probably everything else would stay the same.⁵

Dr. Johnson reviewed the list of claimant's former work tasks prepared by Ms. Mary Titterington and concluded claimant could no longer perform 19 of the 47 tasks for a 40 percent task loss.

On May 12, 2011, Dr. Paul Stein, a board certified neurosurgeon, performed an examination and evaluation of claimant at the request of claimant's attorney. The doctor reviewed claimant's medical records and also took a history from him. Claimant's major complaint was low back pain. Based upon his examination, Dr. Stein found claimant had tenderness to palpation in the lumbar midline to the left more than right, range of motion was restricted, slow, and accompanied by discomfort complaints, and straight leg raising on the left was mildly positive indicating possible nerve root irritation. The doctor diagnosed claimant with low back pain with radicular complaints and lumbar degenerative disk disease at L4-5 and L5-S1. At the time of this evaluation, Dr. Stein opined that claimant was at maximum medical improvement if he elected to not have surgery.

⁴ Johnson Depo. at 19-20.

⁵ *Id.* at 28.

Due to claimant's low back condition, Dr. Stein placed claimant in the DRE Lumbosacral Category III and assigned him a 10 percent permanent partial functional impairment to his body as a whole based upon the *AMA Guides*. The doctor imposed permanent work restrictions on claimant based upon the functional capacity evaluation (FCE). Dr. Stein reviewed the list of claimant's former work tasks prepared by Mr. Robert Barnett and concluded claimant could no longer perform 30 of the 34 tasks for an 88 percent task loss.

On cross examination, Dr. Stein agreed claimant had a more significant preexisting problem with his back than he had told the doctor. And Dr. Stein agreed it was possible claimant had a 5 percent preexisting functional impairment before the two injuries he suffered working for respondent. Dr. Stein concluded he did not know what claimant's preexisting functional impairment, if any, might have been and that claimant was able to perform fairly physical activity but now has a 10 percent functional impairment with permanent restrictions.

Mary Titterington, a vocational rehabilitation counselor, conducted a personal interview with claimant on July 1, 2011, at the request of respondent's attorney. She prepared a task list of 47 nonduplicative tasks claimant performed in the 15-year period before his injury. At the time of the interview, the claimant was unemployed and receiving unemployment benefits. Based on restrictions of Drs. Johnson and Stein, Ms. Titterington opined that claimant was capable of performing work in the open labor market such as light delivery driving, security work, light assembler or packing, limited range of cashier jobs, night front desk clerk and telephone solicitor jobs.

Dr. Robert Barnett is a licensed clinical psychologist, rehabilitation counselor and evaluator as well as a job placement specialist. At claimant's attorney's request, Mr. Barnett conducted a telephone interview with claimant on May 13, 2011, in order to conduct a wage and task loss assessment. He prepared a task list of 34 nonduplicative tasks claimant performed in the 15-year period before his injury.

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.⁶ The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.⁷

⁶ *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 257 P.3d 255 (2010); *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

⁷ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

Both Drs. Johnson and Stein concluded claimant had suffered an aggravation of his preexisting degenerative disk disease in the two incidents at work. But there was disagreement whether claimant had suffered merely a temporary exacerbation of his preexisting back condition or a permanent aggravation.

Dr. Johnson provided equivocal testimony regarding whether claimant's lifting incident at work permanently aggravated his preexisting back condition. Initially, Dr. Johnson agreed that although the motor vehicle accident was a temporary aggravation, the lifting incident permanently aggravated claimant's back condition. But after reviewing claimant's recorded statement, Dr. Johnson concluded he could not state whether claimant had suffered a permanent aggravation. Conversely, Dr. Stein concluded that claimant's degenerative disk disease was permanently aggravated by the work incidents. But both doctors imposed permanent work restrictions and before these accidents the claimant had worked without restrictions.

The ALJ analyzed the evidence in the following fashion:

There were two opinions offered as to the nature and extent of Claimant's impairment due to the work related accidents. Dr. Johnson acknowledged that Claimant's low back condition was aggravated at a minimum by the accident on March 26, 2010. However, Dr. Johnson did not apportion any of this rating to account for that aggravation. Dr. Stein's opinion as to Claimant's permanent impairment is more credible. Dr. Stein acknowledged that Claimant had some preexisting conditions in his low back. However, there was insufficient information given to him to assign a rating if any to account for any preexisting impairment. Therefore it is found and concluded that Claimant's functional permanent impairment is ten percent to the body as a whole.

Claimant has a one hundred percent wage loss since September 9, 2010. Therefore, Claimant is entitled to a permanent partial general disability award based on task loss and wage loss. Both doctors assigned the same permanent restrictions. However, each doctor reviewed different task lists. Both task lists were equally credible. The best indicator of Claimant's task loss is an average of both opinions of task loss which is eighty-eight percent and forty percent respectively. Claimant's task loss is sixty-four percent. Claimant's permanent partial general disability award is eighty-two percent.

The Board agrees and affirms.

Moreover, the claimant was able to perform his job duties without restriction until the two accidents. Thereafter, both doctors provided permanent work restrictions. Even assuming claimant did not suffer additional permanent functional impairment he would still

be entitled to a work disability under the facts of this case as he now has permanent restrictions due to the two incidents.⁸

Lastly, the respondent argued claimant was not entitled to future medical treatment. But that argument was premised upon the conclusion that claimant had only suffered temporary aggravation from his two work incidents. Because the Board concludes claimant suffered an additional permanent impairment that argument is denied. Claimant is entitled to future medical treatment upon proper application.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁹ Accordingly, the findings and conclusions set forth above reflect the majority’s decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Rebecca Sanders dated October 27, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
Ryan Wetz, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge

⁸ See, *McLaughlin v. Excel Corp.*, 14 Kan. App. 2d 44, 783 P.2d 348, *rev. denied* 245 Kan. 784 (1989).

⁹ K.S.A. 2010 Supp. 44-555c(k).